NO. 90-708

IN THE
UNITED STATES SUPREME COURT
OF THE UNITED STATES

ANDREW ANDERSON PETITIONER

VS.

COMMONWEALTH OF KENTUCKY RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

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I. QUESTION PRESENTED FOR REVIEW

Whether statements of a non-testifying police informant relayed to the jury through a police officer's testimony violated the Petitioners' Sixth Amendment right of confrontation.

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IN THE
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VS.

COMMONWEALTH OF KENTUCKY RESPONDENT

OPINION BELOW

The opinion of the Commonwealth of Kentucky Court of Appeals was rendered on February 23, 1990, in an unpublished opinion. A copy of said opinion is contained in appendix A. The Commonwealth of Kentucky Supreme Court decision denying Petitioner's motion for discretionary review was entered on August 29, 1990, and is reproduced in Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Commonwealth of Kentucky Court of Appeals was rendered on February 23, 1990. A Motion for Discretionary Review to the Commonwealth of Kentucky Supreme Court was timely filed and denied on August 29, 1990. The jurisdiction of this Court is invoked pursuant to 28 USC section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

> Rights of Accused. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner, ANDREW ANDERSON, was indicted by a grand jury sitting in Louisville, Jefferson County, Kentucky, on July 13, 1988, in a four (4) count indictment. That indictment named Petitioner in two (2) counts of trafficking in a controlled substance (a Schedule II narcotic-cocaine) and a single count of unlawful transaction with a minor in the second degree. Petitioner entered a plea of not guilty and a trial date was set for November 1, 1988, in the Jefferson Circuit Court.

Division Ten, Hon. Rebecca J. Westerfield, Judge, presiding.

Following a two (2) day trial, the jury found the Petitioner guilty of trafficking in a controlled substance. The Court, without intervention of a jury, sentenced Petitioner to a total term of imprisonment of eight (8) years and fined him $10,000.00.

The transaction which led to the Petitioner's arrest was arranged by one Sherman Bell (hereinafter "Bell"), a confidential informant of Detective Kevin Rumple (hereinafter "Rumple")

(Transcript of Record, 11/1/88, at 14:55) (hereinafter "TR"). The confidential informant had recently been arrested by Rumple on an armed robbery charge, which carries a potential sentence of from ten (10) to twenty (20) years with no possibility of probation. Rumple testified that Bell lied to him when Bell was being sought in connection with an armed robbery charge (TR 11/1/88, at 15:02-15:04). Bell also had a warrant for first degree assault outstanding. Following Bell's agreement

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1. The record on appeal and for purposes of this petition consists of the videotape transcript of the Petitioner's trial. No written transcript has been produced.

to cooperate with the police, Rumple appeared in Court for him and as a result of this assistance Bell was released on his own recognizance despite the seriousness of the charges. In return for these favors, Bell agreed to provide the officers with a drug trafficker. A "controlled buy" was set up and Bell was fitted with a wire with which police officers used to monitor his conversation with an unidentified third party. When the arrest occurred Bell had both the drugs and the money in his possession. Petitioner was located a short distance away from where the exchange took place.

Detective Woody Graff (hereinafter "Graff") was present at the scene

of the arrest and overheard certain negotiations between the confidential informant and the unidentified third party. Graf described to the jury discussions regarding price and quantity he heard as a result of the "wire" which took place between Bell and the unidentified third party. The unidentified third party was inferred to be the Petitioner through this testimonty although this was never demonstrated because the confidential informant did not testify at trial. None of the officers testifying to the hearsay statements were able to directly identify the voice of the third party.

Graff's testimony contained numerous hearsay statements which were

prejudicial and damaging to the Petitioner. An objection to this hearsay testimony was made by Petitioner's counsel. However, the Court found that the testimony fit within the "acted upon exception" to the hearsay rule. The trial Court gave an admonition to the jury which indicated the statements were offered to "show why the police took the action they did" and "what the police were relying upon and why they proceeded as they did."

The previous objection on "the acted upon exception" was again raised regarding hearsay statements by Detective Mark Taylor (hereinafter "Taylor") (TR 11/2/88, at 9:37). This objection was also overruled. Taylor then testi-

fied to the substance of the arrangements which were made "to do the deal" between Bell and the unidentified third party. (TR 11/2/88, at 9:37). Taylor's testimony was a repetition of statements that he had overheard from non-testifying third parties and as such it was hearsay.

Petitioner's conviction was affirmed by the Commonwealth of Kentucky Court of Appeals. A Motion for Discretionary Review with the Supreme Court of Kentucky was denied on August 29, 1990. This petition, being filed within the required limits, is timely.

REASONS FOR GRANTING THE WRIT

I. THE USE OF INADMISSIBLE HEARSAY TESTIMONY IN DEROGATION OF THE PETITIONER'S SIXTH AMENDMENT RIGHTS OF CONFRONTATION DEPRIVED PETITIONER OF A FAIR TRIAL

The classic definition of hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c), Black's Law Dictionary, West Publishing Co. (1979), p. 649. Several reasons exist which justify the strict exclusion of hearsay evidence. First a jury is unable to view the declarant's demeanor and pass on his credibility when he is not present. Secondly, the declarant is not under oath when he makes such statements. [2]

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2. Whether an oath would have made much difference to a confirmed liar such as the informant is a matter for speculation since he did not testify under oath at this trial.

However, the primary reason such statements are inadmissible is because they violate a defendant's right to cross-examination. (Amendment 6, U.S. Constitution. Davis v. Alaska, 415 U.S. 308 (1974). Dutton v. Evans, 400 U.S. 74 (1970).

The informant was not trustworthy nor reliable. His statements, overheard but not witnessed by the officers, are likewise not trustworthy nor reliable. The voice the informant was speaking with was never identified. The informant, facing ten (10) to twenty (20) years in the penitentiary, had a motive to prevaricate in order to provide the detectives with a cocaine trafficker.

Stewart v. Cowan, 528 F.2d 79 (6th Cir. 1976), an habeas corpus case from the Western District of Kentucky, addressed the "why they did what they did" exception to the hearsay rule. There, the Sixth Circuit reversed the district court and ordered the Defendant be granted his writ when a police officer testified as to the "result" of his investigation. The Court held that the statements admitted into evidence violated the defendant's right to confrontation, and even went so far as to question the Kentucky hearsay exception.

The Kentucky Court of Appeals affirmed this Petitioner's conviction in reliance on the hearsay exception.

However the exception had been previously modified to require that hearsay explaining why an officer took a certain action is admissible only when the taking of that action is an issue in the case. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988) cert. denied sub nom Aprile v. Kentucky, 479 U.S. 1055 (1989).

Use of hearsay to explain why a police officer took a certain action has been condemned by the Second Circuit Court of Appeals in U.S. v. Tussa, 816 F.2d 58 (2nd Cir. 1987) on remand sub nom U.S. v. Patiwana, 723 F.Supp. 888 (E.D.N.Y. 1989). In Tussa the Court found reversible error in the repetition of a statement of an informant who did

not testify at trial. The statement that a Defendant had carried heroin to an automobile was introduced, ostensibly, to rebut an allegation of recent fabrication on the part of a case agent. The hearsay was used to explain why the second agent had not told the first agent he saw the Defendant leave with the narcotics. Despite the fact that an admonition was given, the error was found to have a "substantial and injurious effect." id.

In U.S. v. Hunt, 749 F.2d 1028 (4th Cir. 1984) cert. denied sub nom Hunt v. U.S., 472 U.S., 1018 (1985), hearsay statements concerning prior criminal allegations were only admissi-

ble after the Defendant "opened the door" by asking what evidence the investigating agents had that the Defendant was corrupt in the past. A vigorous defense based on outrageous governmental conduct was raised. "Where a Defendant elects to challenge the government's conduct of an investigation . . . hearsay . . . for the limited purpose of demonstrating that the investigation was reasonable and free of improper motive [is admissible]." Hunt, 749 F.2d at 1084.

In Petitioner's case there was no such challenge to the government's investigation. The hearsay was not admitted as rebuttal testimony. It was offered to infer that the Petitioner was

trafficking in narcotics and as such was inadmissible. The evidence can only have been introduced to bolster the prosecution's case.

U.S. Brown, 767 F.2d 1078 (4th Cir. 1985) condemned the use of "investigative" hearsay to bolster a prosecution's case. In that case six hearsay statements of an unidentified informant were offered by a case agent for the limited purposes of explaining the background as to what occurred during the investigation. The Court found this bolstering of the case was impermissable and resulted in a trial that was essentially unfair.

Similarly the statements in this case constituted a substantial

bolstering of the prosecution's case. The Petitioner was not arrested with any drugs or substantial amounts of money on his person. The only potential explanation for the introduction of the hearsay statements was to infer the Defendant was the unidentified third party with whom the unidentified informant discussed the deal.

Other Circuit Courts of Appeals which have wrestled with the question of "investigative" hearsay have also found it to be inadmissible. See e.g. Harris v. Wainwright, 760 F.2d 1148 (11th Cir. 1985), Hutchins v. Wainwright, 715 F.2d 512 (11th Cir. 1983) cert. denied 465 U.S. 1071 (1984), Favre v. Henderson, 464 F.2d 359 (5th Cir.

1972) cert. denied 409 U.S. 942 (1973), U.S. v. Hilliard, 569 F.2d 143 (D.C. Cir. 1977).

The informant, Bell, provided evidence against this Petitioner without testifying through the hearsay statements of Detectives Graff and Taylor. The Petitioner could not cross-examine that informant to discover the identity of the other party to the conversation. This was a violation of the confrontation clause of the Sixth Amendment to the United States Constitution. The Petitioner was prejudiced by this error; this Court should issue the requested writ because the introduction of the hearsay statements violated the Petitioner's Sixth Amendment rights. The decision of the Commonwealth of Kentucky

Court of Appeals and the Supreme Court of Kentucky must be reversed. The deprivation of such a fundamental right constitutes error.

II. THE VARIOUS CIRCUIT COURTS OF APPEALS ARE NOT IN AGREEMENT WITH THE ADMISSIBILITY OF "INVESTIGATIVE" HEARSAY AND BECAUSE THE RIGHT OF CONFRONTATION IS SO FUNDAMENTAL THIS COURT SHOULD ISSUE ITS WRIT TO SETTLE THIS ISSUE.

Supreme Court Rule 17.1(b) indicates that this Court considers the fact that the various Courts of Appeals have decided an identical question in differing ways as a factor to be evaluated in ruling on a Petition for a Writ of Certiorari.

The Sixth Circuit Court of Appeals in U.S. v. Martin, 897 F.2d 1368

(6th Cir. 1987) apparently retracted on Stewart v. Cowan, 528 F.2d 79 (6th Cir. 1976) without explicitly overruling it by finding Stewart inapplicable to the facts of Martin. The Sixth Circuit found the statements in Martin did not go to the very heart of the government's case.

The dissenting opinion in Martin noted that no Court has yet explained why investigative background is not hearsay although other circuits have provided "ambiguous support" for the contention that it is not.

In U.S. v. Freeman, 816 F.2d 558 (10th Cir. 1987) the Court simply found investigative hearsay statements were not offered for the truth of the

matter asserted and therefore they were not hearsay.

In U.S. v. Taylor, 792 F.2d 1019 (11th Cir. 1986), cert. denied sub nom King v. U.S. and Martin v. U.S., 481 U.S. 1030 (1986) hearsay statements made by a non-testifying declarant to a police officer which were then repeated to a second police officer who testified at trial were held admissible. The statement was given to the first police officer by a kidnapping victim. The victim had escaped from his captors and had been detained by police as a prowler. The first officer died prior to trial which necessitated the second officer's testimony. This double hearsay, which cooborated another victim's

trial testimony was offered only to show why the victim detained as a prowler was not arrested as a prowler. The statement was not for the truth of the matter asserted only to explain why the "prowler" was not arrested. However by its very nature it served to bolster the prosecution's case.

Other cases from various circuits also demonstrate the discrepancy Courts have had in dealing with investigative hearsay. See e.g. U.S. v. Cruz, 805 F.2d 1464 (11th Cir. 1986) cert. denied 481 U.S. 1006 (1987) and Thomas v. U.S., 482 U.S. 930 (1987), U.S. v. Lazcano, 881 F.2d 402 (7th Cir., 1989), U.S. v. Johnson, 872 F.2d 612 (5th Circuit 1989) reh'g denied 880 F.2d 413 (5th Cir. 1989).

Even within circuits there is confusion as to the existence of the "investigative" hearsay exception. Compare U.S. v. Cruz, 805 F.2d 1464 (11th Cir. 1986), cert. denied 481 U.S. 1006 (1987) and Thomas v. U.S., 482 U.S. 930 (1987) with Harris v. Wainwright (11th Cir. 1985); Steward v. Cowan, 528 F.2d 79 (6th Cir. 1976) with U.S. v. Martin, 897 F.2d 1368 (6th Cir. 1990); Favre v. Henderson, 464 F.2d 359 (5th Cir. 1972) cert. denied 409 U.S. 942 (1973) with U.S. v. Johnson, 872 F.2d 612 (5th Cir. 1989) reh'g denied 880 F.2d 413 (5th Cir. 1989).

The confusion surrounding this type of hearsay testimony requires the

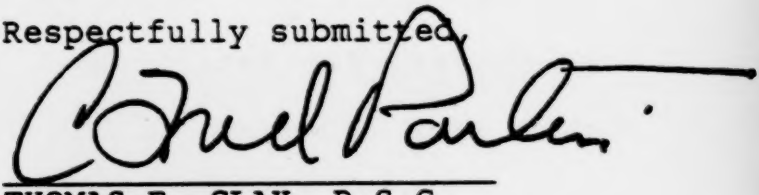
type of finality that only a United States Supreme Court decision can impose. The wide range of opinions being established by the federal circuits detracts from uniformity of the law. Without such uniformity trial Courts are left with insufficient guidance and because of that they are more prone to make erroneous rulings.

CONCLUSION

The United States Supreme Court is presented with an opportunity to settle a controversial issue of criminal law. Granting certiorari in the case will promote uniformity among the various circuits and reduce error at the trial level by providing appropriate guidance where it is most needed.

Further, because the decision of the Commonwealth of Kentucky Court of Appeals and the denial of the motion for discretionary review erroneously deprived the Petitioner of his Sixth Amendment right of confrontation the requested Writ of Certiorari should be issued.

Respectfully submitted,



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VS.

COMMONWEALTH OF KENTUCKY RESPONDENT

NOTICE OF APPEARANCE

The Clerk of the United States Supreme Court will enter my appearance as counsel for Petitioner. I certify that I am a member of the bar of the United States Supreme Court. The Clerk is requested to notify the undersigned of action by the Court by regular mail.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was mailed, postage prepaid, this 26th day of Oct., 1990, to Hon. Fred Cowan, Attorney General, Capitol Building, Frankfort, KY 40601.

C. FRED PARTIN

APPENDIX

SUPREME COURT OF KENTUCKY
90-SC-192-D
(89-CA-267)

ANDREW ANDERSON, JR. MOVANT

VS. JEFFERSON CIRCUIT COURT
88-CR-1166

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED August 29, 1990.

/s/Robert F. Stephens
Chief Justice

RENDERED: February 23, 1990; 3:00p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 89-CA-267-MR

ANDREW ANDERSON, JR. APPELLANT

VS. APPEAL FROM JEFFERSON CIRCUIT
HONORABLE REBECCA WESTERFIELD, JUDGE
ACTION NO. 88-CA-1166

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING

* * * * * * *

BEFORE: HOWERTON, Chief Judge, GUDGEL, and MILLER, Judges.

GUDGEL, JUDGE: This is an appeal from a judgment entered by the Jefferson Circuit Court. Appellant contends that the court erred (1) by admitting certain

alleged hearsay statements, (2) by failing to give a certain instruction (3) by finding that a certain juvenile witness was competent to testify (4) by denying his motion for a directed verdict and (5) by considering appellant's failure to cooperate with police in imposing his sentence. We disagree with all of appellant's contentions. Hence, we affirm.

On June 24, 1988, Louisville police conducted a controlled narcotics buy. Confidential informant Sherman Bell was wired with a body microphone and given about $3,500 to make a buy. Shortly thereafter police observed appellant Andrew Anderson driving a car in which Kenneth Watson, a juvenile, was

a passenger. Next, police saw appellant carrying a bag containing white powder. Police were told by radio that the drug deal "would come down" at a certain Shell station. Police proceeded to the Shell station where they observed Kenneth walk across a field and give a bag containing cocaine to Bell. When Kenneth saw police, he began to flee. All three suspects were arrested, and three ounces of cocaine was seized.

Appellant was indicted for the offenses of trafficking in a controlled substance and unlawful transaction with a minor in the second degree. A jury convicted appellant of the trafficking charge but found him not guilty of the unlawful transaction charge. Appellant

was sentenced to eight years in prison and fined $10,000. This appeal followed.

First, appellant contends that the court erred by permitting Detectives Graff and Taylor to testify to certain alleged hearsay statements overheard in a conversation between informant Bell and another person who was not identified. We disagree.

The court admonished the jury that this testimony concerning price and quantity was admitted to show why the police drove to the Shell station, not to prove that money or illegal drugs were to be exchanged there. In the recent case of Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988), our supreme

court discussed at length the "verbal act" doctrine, a nonhearsay use of extrajudicial statements. An example of the doctrine is the extrajudicial statement to a police officer offered to explain the action subsequently taken by police. See Manz v. Commonwealth, Ky. App., 257 S.W.2d 581 (1953). Moreover, the testimony objected to here did not implicate appellant because the detectives did not identify appellant as the person to whom Bell was speaking. Bell apparently could not be located and did not testify at trial.

Next, appellant urges that the court's failure to give an "addict/informant" instruction was error. We decline to review this issue

because appellant did not comply with RCr 9.54(2) which requires a specific objection to be made before the court instructs the jury in order to preserve any alleged error. Neither the record nor the videotape transcript of the evidence reflects that this was done. In addition, the record does not contain a tendered "addict/informant" instruction.

Next, appellant argues that the court abused its discretion by finding that Kenneth Watson, the sixteen year old juvenile who was arrested with appellant, was competent to testify. WE disagree. The court conducted an extensive competency hearing. Kenneth clearly demonstrated that he knew the differ-

ence between the truth and a lie even though her did not understand the meaning of an oath or of perjury. In determining whether a juvenile is competent to testify the court must decide if the child is "sufficiently intelligent to observe, recollect, and narrate the facts and has a moral obligation to speak the truth." Gaines v. Commonwealth, Ky., 728 S.w.2d 525, 526 (1987). Our review of the videotape reveals no error by the trial court in adjudging Kenneth competent to testify.

Although Kenneth admitted that he had drunk three or four beers and had smoked marijuana cigarettes laced with cocaine on the day of his arrest, this does not mean he was incapable of remem-

ber or telling the truth. Moreover, under cross examination appellant's counsel questioned Kenneth at length regarding his intoxication and ability to remember. The weight to be given Kenneth's testimony was up to the jury. Id. at 527.

Next, appellant argues that the court erred by failing to grant his motion for a directed verdict. Again, we disagree. Contrary to appellant's assertion, there is considerably more evidence of appellant's guilt than his presence at the scene. Moreover, even though the cocaine was not admitted into evidence, it was shown to the jury, the chemist testified that the substance was cocaine and the chain of custody was

proved. Under the evidence as a whole it was not clearly unreasonable for the jury to find appellant guilty. Thus, the court did not err by denying his motion for a directed verdict. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983).

Finally, appellant urges that the court violated his constitutional right to remain silent by considering his failure to cooperate with police in determining his sentence. We disagree. Although the commonwealth recommended a five year sentence, the court was not bound by this recommendation. Bowling v. Commonwealth, Ky., 684 S.W.2d 11 (1985).

At the sentencing hearing the judge stated that she was extremely

concerned about appellant's prior offenses involving assault and weapons. In addition, she expressed concern about the substantial amount of controlled substance involved in this trafficking offense. The judge then stated that earlier she had informed appellant that any meaningful information as to the source of the illegal drugs would be taken into consideration. The commonwealth attorney was then asked if there had been any cooperation by appellant. The commonwealth responded, "No." Without further comment, the judge imposed a sentence of eight years and a fine of $10,000.

We have reviewed the federal cases cited by appellant and find them

to be distinguishable on the facts. Furthermore, we are of the opinion that a judge is given wide discretion as to matters which may be considered in imposing sentence. See KRS 532.050. We find no error in the court's conduct of appellant's sentencing hearing.

The court's judgment is affirmed.

ALL CONCUR.

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